No. 10213

In the United States Circuit Court of Appeals for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF ELISHA COBB MAYO, DECEASED, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE PETITIONER

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OPINION BELOW

The only previous opinion in the present case is that of the United States Board of Tax Appeals (R. 14–25) which is a memorandum opinion and, therefore, not officially reported.

JURISDICTION

This petition for review (R. 26–29) involves federal estate taxes due from the estate of Elisha Cobb Mayo who died testate on August 26, 1937. On February 29, 1940, the Commissioner of Internal Revenue mailed to the respondent, as executor of the decedent's estate, a notice of a deficiency in the amount of $5,971.61.

(R. 8–12.) Within 90 days thereafter, and on May 6, 1940, the respondent, the decedent's executor, filed a petition with the Board of Tax Appeals for a redetermination of that deficiency under the provisions of Section 871 of the Internal Revenue Code. (R. 1, 3–12.) The decision of the Board of Tax Appeals that there was no deficiency was entered December 30, 1941. (R. 25–26.) The case is brought to this Court by a petition for review filed on March 14, 1942 (R. 26–29), pursuant to the provisions of Sections 1141–1142 of the Internal Revenue Code.

QUESTION PRESENTED

A testator left his property in trust to pay to his sister an annuity of $3,000 in monthly payments, with power in the trustee to pay the annuitant additional sums in case of accident, illness, or other unusual circumstances, with remainder at his sister's death to certain charities. The question presented is:

Whether the amount of the bequest to the charities was ascertainable at the date of the testator's death under Section 303 of the Revenue Act of 1926, as amended, and the applicable Treasury Regulations, despite the possibility of invading the trust corpus in order to make the annuity payments and despite the trustee's unrestricted power to invade the trust corpus to pay the annuitant additional sums in case of accident, illness, or other unusual circumstances.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved may be found in the Appendix, *infra*, pp. 25–27.

STATEMENT

The facts, some of which were stipulated (R. 33–41), and as found by the Board of Tax Appeals (R. 15–20), are substantially as follows:

The estate of Elisha Cobb Mayo, the Bank of America National Trust and Savings Association, executor, is a decedent's estate with its address at Santa Rosa, California. It filed an estate tax return on behalf of the decedent's estate with the Collector of Internal Revenue for the First Division of California. (R. 15.)

Elisha Cobb Mayo died testate on August 26, 1937. His will, subscribed to in Sonoma County, California, on April 3, 1937, contained, *inter alia,* the following provisions (R. 15):

> Second: I hereby declare that my only near of kin is my sister Rebecca S. Mayo and her welfare is uppermost in my mind, and I request my Trustee hereinafter named to give her every care, advice and assistance possible.
>
> * * * * *
>
> Fourth: I give, devise and bequeath to my sister Rebecca S. Mayo my house and lot * * * together with all household goods and personal property in said home contained.

Then follow certain specific bequests totaling $3,500 to various individuals and one for the perpetual care and upkeep of a cemetery plot, after which appears the provision about which this controversy centers (R. 15–16):

> Sixth: I hereby give, devise and bequeath all the rest, residue and remainder of my estate of whatsoever kind or character and wheresoever

situated, to the Bank of America National Trust and Savings Association, a National Banking Association, (Santa Rosa Branch), to be held in trust for the following uses and purposes in relation to the same.

* * * * *

From the said trust property my aforesaid trustee shall pay the sum of Two Hundred Fifty ($250.00) dollars per month to my sister Rebecca S. Mayo, said payments to run from the date of my death, and in case she should, by reason of accident, illness, or other unusual circumstances so require, such additional sum or sums as in the judgment of said trustee may be necessary and reasonable under the existing conditions.

Upon the death of my said sister the said trustee shall liquidate my entire estate and from the proceeds shall pay to the beneficiary hereinafter named the amounts hereinafter mentioned, to wit:

Here are specified bequests of $2,000 to each of the following (a) Millers River Hospital, (b) Sonoma County Tuberculosis Association, (c) Children's Home Society of 3595 66th Avenue, Oakland, California, (e) Sonoma County Social Service Department; also, bequests of $1,000 to each of the following: (d) The Blind Department of the California State Library at Sacramento, California, to be used for the purchase of books for the blind, (f) the Santa Rosa Chapter of the American National Red Cross Society, and (g) the Santa Rosa Salvation Army. In addition there are provided specific bequests of $500 to each of the following: (h) The Santa Rosa Humane Society, (i) the Santa Rosa District of the Boy Scouts of America,

and (j) the Santa Rosa Camp Fire Girls. An additional bequest of $20,000 is provided for the County of Sonoma to be used for the furnishing of rooms and accommodations at the Sonoma County Hospital for worthy and deserving indigent persons. It is provided that the residue of the trust estate is to go to the American National Red Cross Society. (R. 16–17.)

The value of the gross estate of Elisha Cobb Mayo, deceased, computed in accordance with the provisions of Section 302 (j) of the Revenue Act of 1926, as amended by Section 202 of the Revenue Act of 1935, was $114,853.37. (R. 17.)

The undisputed deductions from gross estate, allowable under the applicable Revenue Acts, exclusive of specific exemption, amount to $5,226.85. (R. 17.)

On the federal estate tax return filed for the estate of Elisha Cobb Mayo, deceased, a deduction of $93,-776.70 was claimed under the heading of "Charitable, public and similar gifts and bequests," which deduction was totally disallowed by the Commissioner. (R. 17.)

It is agreed between the parties that all the organizations listed in paragraph Sixth of decedent's will are of a charitable or public nature within the scope of the federal internal revenue laws. It is also agreed between the parties that none of the bequests to these organizations (except as to the $1,000 to the California State Library, the $2,000 to the Sonoma County Social Service Department and the $20,000 to the County of Sonoma for rooms and accommodations for worthy poor persons), is of the type contemplated by Section

42 of the California Probate Code as it was worded at the time of decedent's death. (R. 17–18.)

The last will and testament of the decedent was admitted to probate on September 10, 1937, by the Superior Court of California, in and for the County of Sonoma. On February 3, 1938, Rebecca S. Mayo, sister of the decedent, and his only heir at law, executed a waiver with respect to the rights provided for and granted to her, in, by or under Section 41 of the California Probate Code. On April 15, 1938, the court made a decree of settlement of the first account and report and order of partial distribution. This decree has never been contested. On October 7, 1938, the court entered a decree settling the final account and for distribution, which decree has never been contested. (R. 18.)

Rebecca S. Mayo, decedent's sister, was in her seventy-ninth year at the time of decedent's death. Her eyesight was then greatly impaired. In October, 1935, an operation was performed on both her eyes for glaucoma, and in May, 1936, an operation was performed on her right eye for a cataract. An examination of her eyes made in August, 1938, showed "Left eye—Hand motion three inches. Right eye approximately eighteen per cent vision." (R. 18–19.)

At the time of decedent's death Rebecca S. Mayo owned the following property: (1) The home in which she lived, valued at $3,500; (2) stocks and bonds valued at approximately $16,000; and (3) savings bank accounts with deposits totaling $7,465.13. The income from these assets during 1937 was approximately $900.

Her living expenses during 1937 for housekeeper, taxes, food, clothing and miscellaneous purposes were approximately $1,450. (R. 19.)

The foregoing facts have all been stipulated by the parties and, in addition to those facts, the Board has made the following findings from evidence introduced at the hearing. (R. 19.)

Since decedent's death the monthly payments of $250 to Rebecca Mayo have at all times been paid out of income of the trust corpus. The gross income from the trust corpus (composed of stocks, bonds and a small amount of cash), for the year 1937 was $6,338.32 and, after deducting the difference between gains and losses on security sales, there was a net income of $4,814.67. The net income of the trust corpus in 1938 was $5,298.79 after deduction of state and federal income taxes and losses on securities sold. In 1939 the net income was $3,995.77 after deduction of income taxes, administration expenses and losses on securities sold. In 1940 the net income was $4,872.51, after the usual deductions. (R. 19.)

The accounts which the trustee filed annually with the court distinguished income and principal and always indicated Rebecca Mayo's $3,000 annual allowance as a charge against the income account. (R. 20.)

Rebecca Mayo deposited in her savings account for accumulation the greater part of the $250 monthly payments made to her from the trust. Her activities at the time of her brother's death and thereafter were greatly restricted due to the condition of her eyesight and her advanced age. (R. 20.)

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STATEMENT OF POINTS TO BE URGED

The Board of Tax Appeals erred:

1. In holding that the estate is entitled to a deduction from the decedent's gross estate of the amount of the value of the remainder interest in the residuary trust estate created under the decedent's will, as a bequest to charitable organizations.

2. In holding that the amount of the value of the charitable gifts could be ascertained with reasonable accuracy at the date of the testator's death, although the trust estate was subject to an annuity and to additional payments to the annuitant in case of "accident, illness, or other unusual circumstances."

3. In holding that there is no deficiency in estate taxes due from the taxpayer.

SUMMARY OF ARGUMENT

In determining whether a bequest to charities is deductible from the gross estate of a decedent, the test laid down by the Treasury Regulations and the court decisions construing the statute is whether the amount of the bequest to the charities is ascertainable at the date of the death of the decedent. In this case the gift to charities was subject to some prior bequests which could not be reduced to definite sums of money. In his will the testator directed that certain property be left in trust from which the trustee was to pay $250 per month to his sister for the rest of her life and in case she should, by reason of accident, illness, or other unusual circumstances, so require such additional sum or sums as in the judgment of the trustee may be necessary and reasonable under the existing conditions.

The record shows that the income of the trust was sufficient for several years after the death of the decedent to pay the $3,000 annuity. But the decisions of the Supreme Court indicate that a deduction for a charitable gift will be allowed only if the value of the gift can be ascertained definitely at the date of the testator's death. As of that time it could not be said with absolute assurance that the trust income in this case would always be sufficient to pay the annuity. If it should be insufficient, the trustee was undoubtedly authorized to invade the corpus because the testator did not expressly or impliedly limit the annuity to payments out of trust income. Assuming, however, for the purposes of the argument that the trust income would be sufficient in all future years to take care of the annuity, there is no way in which we could ascertain with a reasonable degree of accuracy the accidents and illnesses that would befall the testator's sister during the remainder of her life and the amount of money that the trustee would be obliged to pay her on that account. The trust income did not exceed the annuity sufficiently that one could predict that the corpus would never be invaded. If the corpus should be invaded, there is no method of fixing the extent to which it will be invaded.

The weight of authority holds that the mere existence of the power to invade the corpus or the possibility of invasion is sufficient to defeat the deduction from gross income because under such circumstances it is impossible to ascertain the amount of the charitable bequest at the time of the testator's death.

ARGUMENT

The amount of the bequest to the charities was not ascertainable at the date of the testator's death under section 303 of the Revenue Act of 1926, as amended, and the applicable Treasury regulations, because of the trustee's unrestricted power to invade the trust corpus to pay the annuitant additional sums in case of accident, illness, or other unusual circumstances

In this case the decedent left a will in which he made certain specific bequests and an annuity of $250 per month to his sister and additional sums to his sister in case of accident, illness, or other unusual circumstances; upon the death of his sister the remainder of his estate to certain charitable and public organizations. (R. 16–17, 17–18.) The will provided in part as follows (R. 16):

> From the said trust property my aforesaid trustee shall pay the sum of Two Hundred Fifty ($250.00) dollars per month to my sister Rebecca S. Mayo, said payments to run from the date of my death, and in case she should, by reason of accident, illness, or other unusual circumstances so require, such additional sum or sums as in the judgment of said trustee may be necessary and reasonable under the existing conditions.
>
> Upon the death of my said sister the said trustee shall liquidate my entire estate and from the proceeds shall pay * * *.

Section 303 of the Revenue Act of 1926, as amended (Appendix, *infra*), provides in part that the value of the net estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, etc., to or for the use of the United States, any state, any political subdivision thereof, for exclusively

public purposes or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes.

Article 44, Treasury Regulations 80, relating to Section 303 of the Revenue Act of 1926 (Appendix, *infra*), provides in part that if a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only insofar as such interest is presently ascertainable, and hence severable in favor of the interest for private use. The validity of this regulation was approved by the Second Circuit in *Burdick* v. *Commissioner,* 117 F. 2d 972, 974, certiorari denied, 314 U. S. 641.

Article 47 of Treasury Regulations 80, relating to Section 303 of the Revenue Act of 1926, as amended (Appendix, *infra*), provides in part that if the legatee or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

It is well established that the estate tax is not based upon the succession to property of legatees or devisees but is imposed upon the transmission of the property of the decedent at the date of his death. The tax attaches immediately upon the death of the decedent and the net estate must be determined as of that date. *Humes* v. *United States,* 276 U. S. 487; *Ithaca Trust*

Co. v. *United States,* 279 U. S. 151, 155; *United States* v. *Provident Trust Co.,* 291 U. S. 272; *Gammons* v. *Hassett,* 121 F. 2d 229 (C. C. A. 1st), certiorari denied, 314 U. S. 673.

Applying the statute and the regulations to the facts of this case, the principal question would seem to be whether the amount of the charitable bequests could be definitely ascertained as of the date of the decedent's death, in view of the fact that the trustee might invade the corpus in order to pay the annuity and also in case of accident, illness or other unusual circumstances. If the amount of the bequest could be definitely ascertained as of the date of the decedent's death, the charitable bequest is deductible; otherwise, it is not deductible.

In this case the testator died on August 26, 1937 (R. 15), at which time his sister was 79 years old (R. 18). He left a gross estate with a value of about $114,000. The undisputed deductions from the gross estate, exclusive of specific exemption, amounted to about $5,000. (R. 17.) This leaves a balance of about $109,000, out of which he left to his sister his house and lot and all household goods and personal property in his home; then followed certain specific bequests totaling $3,500 and one for the perpetual care and upkeep of a cemetery plot. (R. 15.) Therefore the residue which was left in trust (R. 15–16) could not have amounted to much more than $100,000. Out of this residue, the trustee was to pay $250 per month to his sister, the payments to run from the date of his death. (R. 16.) In other words, the residuary estate was first charged

with an annuity of $3,000 per year, payable in monthly installments to the testator's sister.

The net income for the estate for 1937 was about $4,800; for 1938, about $5,200; for 1939, about $3,900; for 1940, about $4,800. (R. 19.) If the annuity of $3,000 is subtracted from the net income, the balance of the income for 1937 was about $1,800; for 1938, about $2,200; for 1939, about $1,900, and for 1940, about $1,800. The record shows that the income of the trust was sufficient for several years after the death of the decedent to pay the $3,000 annuity. But the decisions of the Supreme Court indicate that a deduction for a charitable gift will be allowed only if the value of the gift can be ascertained definitely at the date of the testator's death. As of that time it could not be said with absolute assurance that the trust income in this case would always be sufficient to pay the annuity. If it should be insufficient, the trustee was undoubtedly authorized to invade the corpus because the testator did not expressly or impliedly limit the annuity to payments out of trust income. See *Burnet* v. *Whitehouse,* 283 U. S. 148, 151. But it is more important that under the terms of the trust, the trustee was directed to pay in case the decedent's sister should, by reason of accident, illness, or other unusual circumstances, so require, such additional sum or sums as in the judgment of the trustee may be necessary and reasonable under the existing conditions. (R. 16.) At the time of the testator's death, the sister's eyesight was greatly impaired. In 1935 an operation was performed on both her eyes for glaucoma, and in May, 1936, an operation was performed on her right eye for a cataract. (R. 18.) An

examination of her eyes made in August, 1938, showed "Left eye—Hand motion three inches. Right eye approximately eighteen per cent vision." (R. 18–19.)

It would not seem necessary to labor the argument that the trustee might have been obliged to pay additional sums to the testator's sister because of illness, particularly in view of her bad eyesight, and that such payments might have exceeded the difference between the trust income and the $3,000 annuity. Hospital bills, doctors' fees, nurses' salaries, might well amount to $1,800 or $2,200 in the case of a 79 year old woman with bad eyesight. Once the trustee finds it necessary to invade the trust corpus, we step into the field of pure speculation if we try to guess to what extent it will be necessary to invade corpus. Furthermore, illness is not the only contingency upon the happening of which the trustee is directed to make additional payments to the testator's sister. In the case of accident or "other unusual circumstances," the trustee may make such additional payments as in his judgment may be necessary and reasonable. This leaves the door wide open to additional payments so that it would be pure speculation to attempt to value the amount of the residuary bequest to the charities as of the date of the testator's death. Therefore, under the statute and under the Treasury Regulations, the value of the bequest to charities may not be deducted because it is impossible to ascertain the amount as of the date of the testator's death, and it is not severable from the interest in favor of the testator's sister.

A recent decision of the First Circuit, *Gammons* v. *Hassett, supra* p. 230, supports this view. In that case

the decedent died at the age of 92, leaving a widow, aged 93, who had been bedridden for two years at the time of decedent's death. Under the will the estate was left in trust, the income and "so much of the principal thereof as my said wife may at any time and from time to time *need* or *desire*" (italics supplied), to be paid to his wife during her life. The remainder was left to charitable corporations. At the time of the decedent's death, his property had a value of about $275,000, and his widow's property was worth about $190,000. Over a period of years their combined income had varied between $15,000 and $25,000 a year. They had always lived on a very simple scale and their combined income was in excess of that required to maintain their customary standard of living. The decedent's personal representatives maintained that they were entitled to a deduction of the value of the gift to the charities under Section 303 (a) (3) of the Revenue Act of 1926, which is the same statute that is involved in this case. The Circuit Court affirmed the decision of the District Court which denied the deduction on the ground that the value of the charitable remainders could not be determined at the date of the decedent's death. The court said in its opinion (pp. 232, 233):

> As to the plaintiffs' last contention, we agree that the likelihood of the use of the power was extremely remote at the time of the testator's death, but this fact does not bring the case within the principle of *Ithaca Trust Co.* v. *United States, supra,* and *United States* v. *Provident Trust Co., supra.* In both of those cases the

> value of the charitable gifts was certain with a quality of certainty not present in this case.
>
> * * * * *
>
> We know of no standard fixed in fact by which we could measure either the extent of the life tenant's desires or the likelihood of an exercise of those desires, so that we could place a definite value on the charitable bequests. While we grant that the likelihood of invasion of the principal was extremely remote at the testator's death, still the possibility of invasion did exist and, therefore, the amount of the property which would go to charity was uncertain.

In the instant case, as in *Gammons* v. *Hassett, supra,* the likelihood of the invasion of the corpus was remote. But cases of this type must be governed by the existence of the power rather than the likelihood of its use, as shown by the extrinsic circumstances, varying, of course, in each particular case. See concurring opinion of Judge Magruder in *Gammons* v. *Hassett,* at pp. 234–235.

In *Knoernschild* v. *Commissioner,* 97 F. 2d 213 (C. C. A. 7th), the testator left property to his daughter in trust, with the property to go to charity on the daughter's death. It was provided that the daughter could invade the principal for the purpose of providing financial assistance for her mother or any of her brothers or sisters. The court refused to allow a deduction on account of the charitable bequest. In its opinion the court said (pp. 214–215):

> There is no limitation upon the discretion thus granted to the daughter to divert the income, principal, or both, from charitable purposes to uses entirely private in character, except that

> the diversion must provide "financial assistance." The term is a broad one. It might include a vast sum to retire a mortgage bond issue in default, in order to prevent foreclosure. It might include substantial sums to one or more beneficiaries who had become financially involved, for the purpose of preventing bankruptcy. It would include any untold number of possible necessities for financial aid such as loss by speculation, gambling, unwise investment, loss by fire and water or other elements. In other words, the right extended to her to divert any or all of the funds to the financial aid of a number of other persons is so wide and so broad as to make possible the entire destruction of the corpus of the estate passing to the Academy.

In *Pennsylvania Co. for Insurances, Etc.* v. *Brown,* 6 F. Supp. 582 (E. D. Pa.), affirmed *per curiam,* 70 F. 2d 269 (C. C. A. 3d), the residuary estate was left in trust (1) to pay certain life annuities to designated beneficiaries; (2) to pay $5,000 each to surviving daughters of four nephews and nieces; and (3) upon the termination of all the foregoing trusts to pay over the remainder to designated charities. At the date of death, there were five living daughters, and the two nephews, 45 and 51 years of age, respectively, were both married. The court there recognized that the chances were slender that any more daughters would be born to reduce the bequests to the charities but concluded that the amount was not definitely ascertainable and denied the deduction. The court made this pertinent observation (pp. 583–584):

> Of couse, in this particular case any one could make a pretty good guess at it, but, if there were

> twenty nephews and nieces, all young and all married, the situation would be very different. If that were the case, the charitable bequest might easily be cut in half or more when the time for distribution arrived.

See also *Humes* v. *United States, supra,* in which the Court said (p. 494):

> One may guess, or gamble on, or even insure against, any future event. * * * But the fundamental question in the case at bar, is not whether this contingent interest can be insured against or its value guessed at, but what construction shall be given to a statute. Did Congress in providing for the determination of the net estate taxable, intend that a deduction should be made for a contingency, the actual value of which cannot be determined from any known data? Neither taxpayer, nor revenue officer—even if equipped with all the aid which the actuarial art can supply—could do more than guess at the value of this contingency. It is clear that Congress did not intend that a deduction should be made for a contingent gift of that character.

The instant case is analogous to cases arising under Section 162 (a) of the Revenue Act, which allows as a deduction from the gross income of a trust amounts paid or permanently set aside for charitable purposes. In *Bank of America Nat. T. & S. Ass'n.* v. *Commissioner,* 126 F. 2d 48, decided by this Court in February, 1942, the question was whether certain capital gains were permanently set aside for charitable purposes, where private gifts of the trust income and annuities

were to be paid before the charities took the remainder of the income. This Court decided that the taxpayer failed to maintain the burden of proving the amount of the capital gains, if any, that were permanently set aside for charitable purposes. See also *Guaranty Trust Co. of New York* v. *Commissioner,* 31 B. T. A. 19, affirmed *per curiam,* 76 F. 2d 1010 (C. C. A. 2d), certiorari denied, 296 U. S. 591; *Boston Safe Deposit & T. Co.* v. *Commissioner,* 66 F. 2d 179 (C. C. A. 1st), certiorari denied, 290 U. S. 700; *Charles P. Moorman Home for Women* v. *United States,* 42 F. 2d 257 (W. D. Ky.).

In cases arising under Sections 166 and 167 of the Revenue Act, where the income of trusts is taxed to the grantor even though it is not actually paid to him, the courts have laid down the test of the existence of the power to get control of the trust income or corpus, instead of relying upon the actual use of the power. See *Helvering* v. *Stuart,* decided by the Supreme Court on November 16, 1942 (1942 C. C. H., par. 9750); *Altmaier* v. *Commissioner,* 116 F. 2d 162, 165 (C. C. A. 6th), certiorari denied, 312 U. S. 706; *Kaplan* v. *Commissioner,* 66 F. 2d 401, 402 (C. C. A. 1st); *Rollins* v. *Helvering,* 92 F. 2d 390, 395 (C. C. A. 8th); *Esty* v. *United States,* 63 C. Cls. 455, 462–463; *Helvering* v. *Evans,* 126 F. 2d 270, 272–273 (C. C. A. 3d), certiorari denied, October 12, 1942.

The Board of Tax Appeals decided this case on the authority of its decision in *Field* v. *Commissioner,* 45 B. T. A. 270, which is now pending on appeal to the Circuit Court of Appeals for the First Circuit, *sub.*

nom. Commissioner v. *Merchants Nat. Bank,* which was argued on December 1, 1942, and has not yet been decided. The decision of the Board of Tax Appeals in the *Field* case (in which four members dissented) relies strongly upon the decision of the Supreme Court in *Ithaca Trust Co.* v. *United States, supra.* In the *Ithaca Trust* case (p. 154) the testator gave the residue of his estate to his wife for life with authority to use from the principal any sum "that may be necessary to suitably maintain her in as much comfort as she now enjoys." After the death of the wife there were bequests in trust for charities. The Supreme Court held that the value of the charitable remainder was ascertainable at the date of the testator's death and, hence, deductible from the gross estate. In that case the Supreme Court said (p. 154):

> The principal that could be used was only so much as might be necessary to continue the comfort then enjoyed. The standard was fixed in fact and capable of being stated in definite terms of money. It was not left to the widow's discretion.

It was certain that the charities would take the property over and above what was required to maintain the life tenant's customary standard of living. That amount of property and its value could be determined definitely. In the instant case we have no such certainty. The estate is first subject to an annuity to be paid at the rate of $250 per month for the rest of the annuitant's life, and then to such additional payments as the trustee might make to the annuitant on account of "accident, illness, or other unusual circumstance."

There is no standard fixed in fact by which we can measure the amounts that will be paid on account of accident, illness, or other unusual circumstances. The Board found as a fact that the annuitant's vision was greatly impaired; that there was only 18 percent vision in one eye and hand motion was visible at only three inches in the other; that both eyes had been operated for glaucoma, and one eye for a cataract. (R. 18–19.) Therefore, there was a distinct possibility that substantial sums might have to be spent on account of doctors' and nurses' fees and hospital expenses. This case differs materially on its facts from the *Ithaca Trust Co.* case.

In its opinion in the instant case the Board said that "it seems highly improbable that 'accident, illness or other unusual circumstances' would necessitate the trustee delving into corpus or even surplus income." (R. 21.) But as both the majority and the concurring opinions in *Gammons* v. *Hassett, supra,* point out, the test to be applied in cases of this sort is the *existence* of the power or the *possibility* of invasion of the corpus, not the likelihood of its exercise.

There is a decision of the Tenth Circuit to the contrary, *Commissioner* v. *F. G. Bonfils Trust,* 115 F. 2d 788. In that case, which arose under Section 162 of the Revenue Act of 1934, the majority held that the evidence established beyond a reasonable doubt that there never will be any recourse to the corpus to pay annuities, and that the corpus was, in fact, permanently set aside in the taxable years for charitable purposes. Judge Bratton, who dissented, thought that under the

statute it was immaterial that during the taxable years the corpus was not likely to be invaded. He said (p. 794):

> Up to the present the ordinary, annual income of the trust estate has far more than sufficed to pay the current annuities, and it seems reasonably certain that it will continue to do so in the future. Still, it cannot be foretold with absolute certainty that such condition will always exist to the death of the last survivor of the annuitants.

If this Court should decide to follow the majority opinion in the *Bonfils* case, it may be pointed out that the facts of the two cases differ substantially and that the likelihood of invasion of the corpus is much greater under the circumstances of this case than in the *Bonfils* case. In the latter case the trust income was about five times the amount required for the annuities during the years after testator's death; in this case, they were less than double the amount of the annuity, regardless of other charges, and in several years they were less than 35 percent in excess of the annuity. Moreover, here the corpus could be invaded for purposes other than the payment of the annuity.

This Court will undoubtedly recognize that if the Government prevails on this appeal, the amount of the charitable gifts will be reduced accordingly. Therefore, the Board's opinion makes a strong appeal to construe the statute in a manner that will aid the charities. But it is not Congress that deprived the charities of part of a bequest, it is the testator. If he cuts all the strings

attached to the gift of the remainder, the charities get the remainder free of any charge for estate taxes. But if he makes the gift over contingent upon the non-exercise by the trustee of such broad powers as we have here, it does not seem unfair to deny the deduction. In this connection Judge Magruder said in his concurring opinion in *Gammons* v. *Hassett, supra,* p. 235:

> The testator can save estate taxes by giving an indefeasible remainder to charity upon death of the life tenant. But if he chooses to make the gift over contingent upon the non-exercise by the life tenant of such a broad power as here conferred, it does not seem unfair to deny the deduction. The *Ithaca Trust* case must be considered as going to the very verge of the law, and in the absence of further guidance from the Supreme Court we ought not to extend the doctrine of that case, however logical and appealing the extension might be under the particular facts.

We do not press the argument made before the Board of Tax Appeals that only a portion of the charitable bequests should, in any event, be deductible, that is, not to exceed one-third of the net estate plus the value of the bequests to the California State Library and the Sonoma County Social Service Department, within the meaning of Sections 41 and 42 of the California Probate Code (Appendix, *infra*). The decision of this Court in *Mead* v. *Welch,* 95 F. 2d 617, 619, would seem to preclude the soundness of that argument in this jurisdiction.

CONCLUSION

The decision of the Board of Tax Appeals is wrong and should, therefore, be reversed.

Respectfully sumbitted,

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JANUARY 1943

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 303 [as amended by Sec. 403 (a) of the Revenue Act of 1934, c. 277, 48 Stat. 680]. For the purpose of the tax the value of the net estate shall be determined—
>
> (a) In the case of a citizen or resident of the United States by deducting from the value of the gross estate—
>
> * * * * *
>
> (3) The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, * * *.
>
> * * * * *

Probate Code of California[1] (Deering, 1931):

> * * * * *
>
> § 41. *Restrictions.* No estate, real or personal, may be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, unless done by will duly executed at least thirty days before the death of the testator. If so made at least thirty days before death, such devises and legacies shall be valid, but they may not collectively exceed one-third of the estate of

[1] Sections 41 and 42 of the California Probate Code were amended, effective August 27, 1937, the day *after* decedent died. The sections as quoted above are the sections as in effect on the date decedent died.

a testator who leaves legal heirs, and if they do, a pro rata deduction from such devises and legacies shall be made so as to reduce the aggregate thereof to one-third of the estate. All dispositions of property made contrary hereto shall be void, and go to the residuary legatees or devisees or heirs, according to law.

§ 42. *Exemption of certain donees from restrictions.* Bequests and devises to or for the use or benefit of the state, or any municipality, county or political subdivision within the state, or any institution belonging to the state, or belonging to any municipality, county or political subdivision within the state, or to any educational institution which is exempt from taxation under section 1a of article XIII or section 10 of article IX of the constitution of this state and statutes enacted thereunder, or for the use or benefit of any such educational institution, are excepted from the restrictions of this article.

Treasury Regulations 80 (1937 Ed.):

ART. 44. *Transfers for public, charitable, religious, etc., uses.*—* * *

If a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only insofar as such interest is presently ascertainable, and hence severable from the interest in favor of the private use. * * *

* * * * *

ART. 47. *Conditional bequests.*—If the transfer is dependent upon the performance of some act or the happening of some event in order to become effective, it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed.

If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have

rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

The provisions of Articles 44 and 47 of Treasury Regulations 80 (1934 Ed.) are identical with the above quoted provisions.

U. S. GOVERNMENT PRINTING OFFICE: 1942